Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000558-001 DT 12/28/2011

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
J. Eaton
Deputy

H J VENTURES L L C

v.

DANIEL ERDWURM (001)
WENDY ERDWURM (001)

NELSON EWING II

DANIEL ERDWURM
6006 N 5TH PLACE
PHOENIX AZ 85012
WENDY ERDWURM
6006 N 5TH PLACE
PHOENIX AZ 85012

ARCADIA BILTMORE JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2010558791RC

Defendants Appellants Daniel and Wendy Erdwurm (Defendants) appeal the Arcadia Biltmore Justice Court's determination that (1) Defendants waived any claim to insufficiency of the service of process and (2) Plaintiff was entitled to summary judgment on their claim. Defendants contend the trial court erred. For the reasons stated below, the Court affirms the trial court's judgment.

I. FACTUAL BACKGROUND.

On December 7, 2010, Plaintiff filed a complaint alleging breach of contract. The parties dispute how service of process occurred. Defendants alleged they were not properly served and stated a copy of the summons and complaint was found on the window of Defendant Wendy Erdwurm's car. Plaintiff alleged service was proper and referred to an Affidavit of Service filed by Aurung-Zeb Masowdi on January 12, 2011.[1] On January 26, 2011, Defendants filed an

[1] Affidavit of Service in CC2010558791 RC indicating service by "serving two true copies upon Wendy K. Erdwurm, wife, personally, being of suitable age and discretion and residing therein, at their usual place of abode, 6006 N. 5th Place, Phoenix, Maricopa County, Arizona 85012, at the hour of 2:45 P.M., January 11, 2011."

Answer denying almost all of the allegations of the Complaint[2] but did not raise the service of process issue in their Answer and did not file any Rule 12 (b) motion about service of process before filing their Answer.

Defendants filed a complaint against the process server in Superior Court on February 23, 2011, and a Motion to Dismiss based on the insufficiency of the service of process on February 24, 2011. On April 29, 2011, following a hearing before the Hon. Sam J. Myers,[3] the Court found the Affidavit of Service in this case:

> . . . incorrectly states that there was personal service in the underlying case. The Court finds that Mrs. Erdwurm was not properly served, and that there was no personal service effected on her.

The process server was ordered to complete ten (10) hours of additional process server training.

On March 15, 2011, Plaintiff filed a Motion for Summary Judgment and supported this Motion with a Statement of Facts and an Affidavit from Bradley S. Klein. Both the Motion for Summary Judgment and the Statement of Facts in Support of Plaintiff's Motion for Summary Judgment bear mailing certificates indicating a copy of each document was mailed to (1) Wendy Erdwurm and (2) Daniel Erdwurm on March 15, 2011. Defendants responded to this motion[4] but did not include any contravening facts in their response. The essence of their response is (1) Defendants did not receive a copy of the Motion for Summary Judgment; (2) Defendants deny owing any monies; (3) Defendants challenge the sale of their account from Chase Bank to the Plaintiffs; and (4) Defendants raised the improper service of process as a defense.

The trial court denied Defendants' Motion To Dismiss and granted Plaintiff its Summary Judgment motion in the same Minute Entry. On April 14, 2011, the trial court signed the Judgment. Thereafter, on May 8, 2011, Defendants filed a "Small Claims Motion to Vacate Judgment re-alleging the service of process issue. Plaintiff responded. On May 24, 2011, Defendants filed a "Rebuttal to Plaintiff's Motion To Deny The Order Of Vacation Of Judgment." In their "Rebuttal", Defendants claimed:

> Plaintiff's allegation that the Defendants did not raise the issue of insufficiency of service immediately is a complete fallacy. The Defendants answered the Summons and Complaint as instructed by their attorney. The Defendants then notified the court of the issue IMMEDIATELY, including the Trial Judge, the Clerk of the Superior Court, Bill Jeannes, [sic] who oversees the process server program and Judge Norma [sic] Davis, Presiding Judge of Maricopa Superior

[2] Defendants Daniel Erdwurm's and Wendy Erdwurm's Answer to Complaint dated January 26, 2011. The Answer denies all of the allegations except (1) the allegation relating to Plaintiff's identity and (2) the allegation about Defendant's residency and venue.
[3] Minute Entry in MS 0506118173 dated April 29, 2011
[4] Answer to Plaintiff's Motion To Continue Hearing and Request for Summary Judgment dated April 7, 2011.

> Court. Copies of all of the correspondence are in the case record. Due to scheduling, the hearing over whether there was any process of service did not occur until after the ruling on the summary judgment.

Defendants filed a timely appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. Did The Trial Court Abuse Its Discretion In Finding Any Defects In The Service Of Process Were Waived When Defendants Filed An Answer To The Complaint.

Defendants, for their first claim, assert problems with the original service of process. Defendants claim that rather than receiving personal service or service by mail as required by A.R.C.P., rule 4.1, the process server (1) left the documents on their windshield and (2) filed a false affidavit about the service. After receiving the summons and complaint, Defendants answered the complaint. While Defendants are correct in complaining about the service of process and fraudulent affidavit of service, these complaints do not change the legal consequences of filing an Answer. A.R.C.P., Rule 12 (b), mandates that claims about the insufficiency of service of process must be raised in an initial pleading. A.R.C.P., Rule 12 (h), provides a party waives this defense if it is not raised in an initial pleading or in the answer. A.R.C.P., Rule 4 (f), provides:

> The filing of a pleading responsive to a pleading allowed under Rule 7 (a) of these Rules shall constitute an appearance.

This rule includes the language that was formerly part of Rule 5 (e). In interpreting former Rule 5 (e) and discussing the significance of filing an answer when there is a problem about service of process, our Supreme Court, in *Montano v. Scottsdale Baptist Hospital, Inc*., 119 Ariz. 448, 452, 581 P.2d 682, 686 (1978) said:

> Thus, the appearance of the defendants has the same effect as a timely and valid service of process. Were there a jurisdictional defect by the failure to prosecute the action (serve process) within the time allowed by law, it has been waived by failing to claim it at the earliest opportunity.
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> . . .
>
> Since the defense of insufficiency of service of process was raised by motion after answering to the merits, it was untimely and leave to amend was improperly granted.

The Arizona Supreme Court re-iterated this position in *Snow v. Steele*, 121 Ariz. 82, 588 P.2d 824 (1978).

Because this Court reviews the trial court's actions based on an abuse of discretion standard, this Court will not change or revise a trial court's determination if there is a reasonable

basis for the trial court's decision. *City of Phoenix v. Geyler*, 144 Ariz. 323, 330, 697 P.2d 1073, 1080 (1985). A court abuses its discretion when there is no evidence supporting the court's conclusion or the court's reasons are untenable, legally incorrect, or amount to a denial of justice. *Charles I. Friedman, P.C. v. Microsoft Corp*., 213 Ariz. 344, 141 P.3d 824 ¶ 17 (Ct. App. 2006).

Litigants—pro se or represented—are governed by the applicable rules of procedure. Pre se litigants are also held to the same standards as attorneys regarding these procedures. *In Re Marriage of Williams*, 219 Ariz. 546, 200 P.3d 1043 ¶ 13 (Ct. App. 2008). Because Defendants (1) did not timely raise their insufficiency of service of process defense and (2) pro se litigants are held to the same standard as attorneys, this Court must find Defendants waived their claim about the insufficiency of the service of process.

B. Did the Trial Court Err By Granting Plaintiff Its Motion For Summary Judgment.

A trial court's award of a summary judgment motion is reviewed de novo. *Espinoza v. Schulenburg,* 212 Ariz. 215, 129 P.3d 937 ¶ 6 (2006). All facts and inferences must be viewed in the light favoring the party against whom the summary judgment was granted. *Espinoza v. Schulenburg, id.* If there are disputed facts, summary judgment should not be granted. *Livingston v. Citizens's Utility, Inc*. 107 Ariz. 62, 481 P.2d 855 (1971).

Plaintiff claimed—in its Motion for Summary Judgment—that Defendants failed to pay the charges on their credit card. Plaintiff supported this Motion with an affidavit and a Statement of Facts. Defendants alleged they did not receive a copy of the summary judgment motion. Nonetheless, they filed a responsive motion but did not submit any Statement of Facts supporting their position and did not challenge any of Plaintiff's facts.

To succeed with a Motion for Summary Judgment, Plaintiff must demonstrate: (1) there are no material facts in controversy; and (2) Plaintiff is entitled to judgment as a matter of law. A.R.C.P., Rule 56 (c). Because Defendants did not interpose any affidavits or statement of facts controverting Plaintiff's claim, and because their "Answer to Plaintiff's Motion To Continue Hearing and Request for Summary Judgment." only (1) re-iterates their claim about the service of process and (2) indicates what they would like to do at trial, their response does not conform to the requirements needed to defeat a summary judgment motion. Defendants may not rest on a general denial in their pleadings as a way to defeat a motion for summary judgment. Because Defendants failed to allege any facts contradicting Plaintiff's position, the trial court could find there are no material facts in controversy.[5]

Defendants next allege they did not receive the Motion for Summary Judgment. Plaintiff's Motion for Summary Judgment and Plaintiff's Statement of Facts each bear a mailing certificate indicating the documents were mailed to Defendants. However, because this Court must view the summary judgment motion from Defendants' perspective, this Court will assume

[5] Not only did Defendants not allege any facts in their response to the Motion for Summary Judgment, they never alleged any facts in controversy in any motion or pleading. They also failed to specify the facts in Plaintiff's Statement of Facts which they dispute.

the documents were not timely mailed. While this can pose a procedural problem, Defendants have not demonstrated how they were injured by this procedural defect. They filed a responsive pleading to Plaintiff's motion for summary judgment. The trial court's Minute Entry of April 11, 2011, demonstrates the trial court considered Defendants' responsive pleading before making its ruling. The trial court said:

> Defendants responded to Plaintiffs [sic] Motion for Summary Judgment on 4/6/2011. Defendants again asserted their insufficiency of service argument, denied owing the monies, and challenged the legality of assignee to take over the case. However, Defendants failed to controvert the Statement of Facts within Plaintiffs [sic] Motion for Summary Judgment. It is well settled that an opponent of a Motion for Summary Judgment and [sic] not stand idly by the vain [sic] in hope that a mere scintilla of evidence will blossom into a genuine issue for trial, Orme School v. Reeves, 166 Ariz. 301, 802 P.2d 1000 (1990). [sic] In the case as [sic] bar, this is precisely what the Defendants have done. Defendants have made multiple allegations but have wholly failed to provide the Court with any substantial evidence of documentation that would incline the Court to allow this case to proceed to trial.

Finally, to prevail on a summary judgment motion, Plaintiff must show it is entitled to judgment as a matter of law based on the facts shown. Here, the facts amply demonstrate Defendants incurred credit card debt and failed to pay the entire debt. The facts also show Plaintiff became the successor in interest or assignee of the credit card debt. Plaintiff provided copies of the Bill of Sale for the credit card debt as well as an affidavit from Mr. Klein. They also included copies of the credit card statements as well as the underlying agreement between Chase Bank and the Defendants. Page 5 of the agreement with Chase includes a provision about assignment and allows Chase to:

> . . . assign your account, any amounts you owe us, or any of our rights and obligations under this agreement to a third party. The person to whom we make the assignment will be entitled to any of our rights that we assign to that person.

Because Plaintiff demonstrated (1) Defendants owed a debt to Chase; (2) it had the right to collect on the debt originally owed by Defendants to Chase; and (3) Defendants did not allege any facts contradicting Plaintiff's right to collect on the debt; this Court finds the trial court did not err when it granted summary judgment to Plaintiff. Defendant failed to challenge any of Plaintiff's facts and Plaintiff was entitled to judgment as a matter of law.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Arcadia Biltmore Justice Court did not err when it granted Plaintiff's Motion for Summary Judgment and did not err when it determined that any problems about the service of process were waived when Defendant failed to assert the problem in their Answer.

IT IS THEREFORE ORDERED affirming the judgment of the Arcadia Biltmore Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Arcadia Biltmore Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court 1229020110834